

**DECISION**

**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

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**FILE:**

B-218209

**DATE:** June 4, 1985**MATTER OF:**Devils Lake Sioux Manufacturing  
Corporation**DIGEST:**

1. While contract modifications generally are the responsibility of the procuring agency in administering the contract, the General Accounting Office will consider a protest that a modification went beyond the contract's scope and should have been the subject of a new procurement, since such a modification has the effect of circumventing the competitive procurement statutes.
2. Where a contract as modified is materially different from the original contract, the subject of the modification should be competitively procured unless a sole-source award is appropriate. A modification consisting of a new agreement to deliver, among other things, manufacturing and production machinery and equipment to expand the government's in-house production capabilities under an original contract for supplies and technical assistance exceeds the contract's scope and cannot be justified on a sole-source basis where both the modification and the original contract should have been competed.

Devils Lake Sioux Manufacturing Corporation (DLS) protests a decision of Federal Prison Industries, Inc. (FPI), Department of Justice, to fill its needs for uncured helmet shell assemblies manufactured from kevlar ballistic aramid cloth by modifying an existing contract with Gentex Corporation rather than procuring the assemblies competitively. The assemblies are used for the production

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of military helmets. DLS also protests the original sole source award. While FPI announced in the Commerce Business Daily on November 20, 1984, that it intended to competitively acquire the aramid cloth, a solicitation was never issued because a mutually satisfactory agreement was concluded between FPI and Gentex for continued delivery under the existing contract. DLS challenges several aspects of FPI's decision not to procure the assemblies competitively, insisting that the modification went beyond the scope of the original contract. We sustain the protest.

As a preliminary matter, Gentex questions our continued jurisdiction concerning protests of procurements by FPI under the Competition in Contracting Act of 1984 (Act), Pub. L. No. 98-369, § 2741(a), 98 Stat. 1175, 1199. We have consistently exercised jurisdiction over protests of FPI acquisitions, see, e.g., Niagara Machine & Tool works, B-214288, July 16, 1984, 84-2 CPD ¶ 48, and we believe that we have continued authority to do so. Under the Act, our jurisdiction extends to "Federal agencies" which term includes wholly owned government corporations such as FPI. See 40 U.S.C. § 472 (1982); 31 U.S.C. § 9101 (1982). Moreover, although FPI does not receive annual appropriations from Congress, FPI has an operating fund which we have found to constitute a continuing appropriation for authorized expenditures of FPI. See 60 Comp. Gen. 323 (1981). Accordingly, we have authority over protests of procurements by FPI.

Generally, we do not review protests concerning contract modifications because they involve contract administration which is primarily the responsibility of the contracting agency and outside the scope of our bid protest function. Sierra Pacific Airlines, B-205439, July 19, 1982, 82-2 CPD ¶ 54. We will consider such a protest, however, where it is alleged that the modification is beyond the scope of the original procurement and should have been the subject of a new procurement. Nucletronix Inc., B-213559, July 23, 1984, 84-2 CPD ¶ 82. In this regard, we have stated that if a contract as modified is materially different from the original contract, the subject of the modification should have been competitively procured unless a sole-source award was appropriate. Department of the Interior--Request for an Advance Decision, B-207389, June 15, 1982, 82-1 CPD ¶ 589. In so stating, we express our concern so that improper contract modifications tantamount to unjustified

sole-source awards, in lieu of competitive procurements, will not adversely impact upon the integrity of the competitive procurement process. See American Air Filter Co.--DLA Request for Reconsideration, 57 Comp. Gen. 567 (1978), 78-1 CPD ¶ 443.

#### Background

FPI, beginning in 1982, was awarded contracts by the Department of Defense (DOD) for the production and delivery of military helmets. These ballistic helmets are manufactured from fabric woven from kevlar yarn, a trade-mark of E.I. DuPont and Company. <sup>1/</sup> Since FPI does not have the capability of manufacturing ballistic cloth, it purchases the cloth from outside sources. After having been awarded these contracts by DOD, FPI issued a solicitation for the cloth and several interested sources responded, including Gentex which was ultimately awarded the contract under this solicitation. However, Gentex also presented FPI, outside the framework of this procurement, with a proposal that it asserted would significantly improve FPI's ability to manufacture military helmets. The proposal contained what Gentex considered to be a "unique and revolutionary process" for manufacturing the military helmets that was especially attractive to FPI since the process would not appreciably reduce use of convict labor but would virtually eliminate convict handling of kevlar cloth scrap, a potentially dangerous situation. Further, it was claimed that the use of this process would also significantly reduce FPI's capital expenditures. A sole-source negotiated contract was entered into between Gentex and FPI on July 8, 1983, which was subsequently modified on October 21, 1983.

The contract, as originally awarded to Gentex, provided that the contractor would provide uncured helmet shell subassemblies consisting of numerous plies of kevlar cloth "layered up" in a certain configuration for subsequent molding by FPI. Gentex further provided technical assistance and processing advice, under a non-disclosure agreement, required to fabricate the helmet. The entire

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<sup>1/</sup> In order to be assembled into a helmet shell, the ballistic cloth is coated with resinous materials, cut into appropriate pattern, layered to the desired thickness and sealed into a "lay-up." Proprietary technology may be used in cutting, layering, and sealing the cloth and resin into the lay-up. FPI, under the original contract, used its own equipment to mold this lay-up into a shell. Accessories are then added to complete the helmet.

manufacturing process employed by Gentex is proprietary and a trade secret with a patent application pending. The contract was modified on October 21, 1983, under which Gentex agreed to further disclose art and intellectual property to enable FPI "to more efficiently and effectively . . . convert the [helmet shell]" into the finished helmet assembly. Further, in consideration of the disclosure of this proprietary information, FPI agreed to purchase all of its requirements for shell material from Gentex for a 5-year period.

Under the current modification, Gentex agrees to further disclosures of intellectual property relating to the processes of manufacturing, and also agrees to provide testing and certification. Further, delivery quantities are established based upon awards by DOD to FPI for the year, and certain required government clauses not at issue here are added to the contract. However, under the modification, Gentex, for the first time, also provides significant manufacturing and production machinery and equipment, such as presses and joiners. Also, for the first time, instead of Gentex merely supplying uncured helmet shells, actual preform manufacturing of the shells is now performed at FPI's facilities. We questioned these provisions and requested further information from FPI on this matter. FPI insists that the Gentex machinery is part of an integrated system which includes customized dies central to the Gentex proprietary process. Further, FPI states that it could not have modified generic manufacturing equipment without use of Gentex proprietary data which is barred by the non-disclosure agreement. FPI is therefore arguing, in essence, that a sole-source modification was justified because data was unavailable to permit a competitive procurement.

#### GAO Analysis

As stated previously, if a contract as modified is materially different from the original contract, the subject of the modification should have been competitively procured unless a sole-source award was appropriate. Department of the Interior--Request for an Advance Decision, supra. The agency argues that the acquisition of manufacturing machinery and extended on-site production capabilities are a natural extension of a valid sole-source contract based on the sharing of technology of a unique

manufacturing process. Specifically, the agency states that the "machinery could not have been purchased separately from anyone else [because] the machinery is part of an integrated system which includes the attachment of customized dies, which are central to the proprietary Gentex process."

First, we note that even a cursory review of the original contract and the modification reveals that delivery of production equipment and on-site preform manufacturing were never contemplated by the parties under the original agreement. It was only after experience showed that FPI's manufacturing "was not being enhanced by Gentex's processes as anticipated," that FPI issued the November 20, 1984 CBD announcement for a solicitation to acquire the aramid cloth assemblies from another source for the purpose of protecting FPI's ability to continue operations. FPI's manufacturing was not being enhanced because Gentex was not delivering kelvar material that met specifications, and there was apparently no improvement in FPI's manufacturing capability. As we indicated earlier, the competitive solicitation was not issued, but instead, the amendment in issue was negotiated with Gentex. In our view, then, the modification is beyond the scope of the original contract.

Second, even if we accept the agency's argument that the modification represents a justifiable sole-source procurement because it is a legitimate addition to the original purchase, it follows that the modification is only valid if the initial sole-source award was valid. In this connection, while the protest over the original award appears to be untimely, the agency is attempting to justify a further expansion of a sole-source contract that itself has been challenged as illegally awarded. Under these circumstances, we think the propriety of the initial sole-source award must be examined to determine the propriety of the current modification.

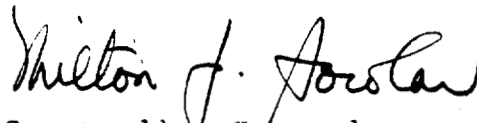
In support of its argument concerning the validity of the initial sole-source award, the agency states that at the time there were no other firms capable of "doing any more than providing the raw kevlar material in rolls or sheets." The record simply does not support this factual assertion. There were then and there are currently other

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producers of helmets for DOD, each ostensibly with its own proprietary manufacturing process. In this regard, manufacturing technology is an appropriate subject of competitive procurement. See AVCO Corporation, System Division, B-216015, Feb. 27, 1985, 85-1 CPD ¶ 245. Thus, regardless of the bona fide proprietary nature of the manufacturing process employed by Gentex, the record shows that other suppliers, using their own methods, can potentially deliver satisfactory material and processes. While Gentex's proprietary process, utilizing its machinery, may best fill FPI's requirements for its manufacturing operations, that proposition ought to be tested competitively.

We therefore believe that both the modification and the initial sole-source awards were improper. We recommend that the procurement be reopened, that other firms be allowed to compete, and that if ultimately the most advantageous proposal or offer is received from another firm, the Gentex contract be terminated for the convenience of the government.

The protest is sustained.

*for*   
Comptroller General  
of the United States

